THE UTAH
PROSECUTOR

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TENTH CIRCUIT

No Suppression Where Officer Acted in Good Faith Reliance on Constitutionally Questionable Ordinance. After pulling defendant over for playing his car stereo in violation of a local noise ordinance that prohibited "[t]he use or operation of any [stereo] . . . disturb[ing] the peace and quiet of neighbors," an officer requested defendant's driver license, registration, and proof of insurance. Defendant responded that he couldn't provide a license because his wallet had recently been stolen, and gave the officer a false name. Informing defendant that he was in "a high-traffic area for narcotics," the officer asked if defendant possessed any weapons or drugs. Defendant responded that the officer was free to search his car. When the officer later discovered that no license had been issued to anyone of the name defendant had provided, and defendant again invited a search of the car, a search was performed revealing methamphetamine and marijuana. Appealing a denied motion to suppress the evidence, defendant argued that the stop was based on the violation of an ordinance that was unconstitutionally vague. Declining to reach the constitutional question, the U.S. Court of Appeals for the Tenth Circuit affirmed on the ground that even if the ordinance was excessively vague, it was not so plainly unconstitutional as to preclude the officer from exercising

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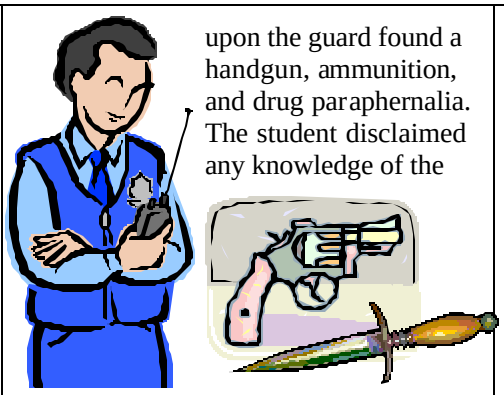
good-faith reliance on its validity. *U.S. v. Vanness*, No. 02-2008 (August 26, 2003).

Additional Culpability Finding Not Required Where Defendant Actually Killed Victim. Defendant was sentenced to death for child abuse murder after a medical examiner and others testified that the fatal injuries sustained by the two-year-old daughter of defendant's live-in girlfriend, who was in defendant's care at the time of the injuries, could not have been accidental. On appeal, defendant argued that certain U.S. Supreme Court cases precluded the imposition of the death sentence without an additional finding that he actually intended to kill his victim. Rejecting this argument, the Tenth Circuit U.S. Court of Appeals noted that the cases cited by defendant dealt with felony-murder circumstances where the defendant has participated only tangentially in the crime, such as driving a getaway car for a robbery in which co-defendants commit an unexpected murder. Joining other circuits that have considered the issue, the Court held that where a jury finds that the defendant himself actually killed a victim, the defendant's mental culpability is sufficiently established to sustain the death penalty without additional findings. *U.S. v. Workman*, No. 01-6448 (August 26, 2003).

Suspension for Bringing Weapon to School Does Not Violate Substantive Due Process. Noticing a car parked in the high school faculty parking lot without a permit, a security guard approached the car and "observed the butt end of a knife sticking up from between the passenger seat and the center console." Discovering that the car was registered to the brother of a student, the guard summoned the student and had him open the car, whereupon the guard found a handgun, ammunition, and drug paraphernalia. The student disclaimed any knowledge of the



contraband, and it was later learned that the weapons belonged to his brother. Nevertheless, concluding that the student should have known that he would be responsible for the items he brought to school, particularly the knife that "was in plain view and readily identifiable as a knife to persons standing outside the vehicle looking in," the school board suspended him for a year. Suing on behalf of their son, the student's parents argued that the school board had violated their son's substantive due process right to a free education when it suspended him without first determining that he had brought the weapon to school "knowingly/intentionally." Arguing that no claim had been stated, and that the school board was entitled to qualified immunity, the School unsuccessfully moved for dismissal. Reversing, the U.S. Court of Appeals for the Tenth Circuit declined to reach the issue of whether a suspension for an "unknowing" act would violate substantive due process, and held only that where, as here, a student "'should have known' he was bringing a weapon onto school property," "the student's substantive due process right, if any, to a public education" is not violated. *Butler v. Rio Rancho Pub. Sch. Bd. of Educ.*, No. 02-2199 (August 25, 2003).

Overwhelming Evidence of Guilt Renders Improperly Admitted Testimony Harmless. After a man pointed a rifle at defendants, accusing them of stealing from him, a struggle ensued. Defendants beat the man severely, then placed him in his car and drove him to a dump where he was later found dead, face-down in the back seat with his legs folded up behind him in a "very unnatural" way. Despite their story that the man had been conscious following the fight, and had requested that they leave him at the dump to "sleep it off," all three defendants were charged in connection with the man's death. At a joint trial, two of the defendants testified, while one of them did not. In *Bruton v. U.S.*, 391 U.S. 123 (1968), the Supreme Court held that the use of inculpatory pre-trial statements made by a non-testifying co-defendant against another defendant violated the Sixth Amendment right to confront adverse witnesses. In a pre-trial interview here, the non-testifying co-defendant had stated that when they were helping the man into the car after the fight, the man had made a "gargling" noise. This statement was used by the prosecution at trial as evidence that defendants were aware of the man's serious injuries and yet showed a reckless disregard for his life. Ultimately convicted of second-degree murder, one of the defendants who had testified at trial argued on appeal that, inter alia, the non-testifying co-defendant's statement had been improperly used against him. Agreeing that constitutional error had been committed, the Tenth Circuit U.S. Court of Appeals nevertheless held that, "in light of the overwhelming evidence against the defendants," including expert medical testimony, autopsy photographs, and defendants' own dubious account of the events, "the admission of the statement . . . was harmless beyond a reasonable doubt." Finding defendants' other claims of error either equally harmless or lacking in merit, the Court affirmed the convictions. *U.S. v. Sarracino*, Nos. 01-2308, 01-2310, 01-2312 (August 19, 2003).

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On the Lighter Side

Excerpts from the *Texas Bar Journal*, April and May 2003, Vol. 66, Nos. 4 and 5.

DID THEY REALLY SAY THAT?

This contribution from **District Judge Kelly G. Moore** of Brownfield (Texas). He explains that "one of the hotly contested issues in a recent wrongful death trial in my court centered around the speed of a tractor trailer rig as it made a turn. Plaintiff's attorney Steven Malouf of Dallas called the truck driver as an adverse witness and gained several admissions related to the speed of the vehicle."

Defense attorney *Larry Wharton* of Lubbock decided to try to *simplify the issue* for the jury by having the driver explain the mechanics of making a turn to the jury. The attached question and answer resulted. *Nothing like a simple explanation to move the process along*.

Q. (By Mr. Wharton) Explain to the jury what you do when you make a right hand turn in regards to the actual operation of your vehicle in terms of the gears?

A. Well, you have to slow the truck down with the gears at the same time while you're tapping the brake. So you tap the brake a little and slow it down. And then when it comes down to a certain RPM—I got a five and a four in that one. So you're in 3rd here and you're in 3rd and 4th, then you'll go for a 3rd and 3rd, which you're gearing up in your auxiliary which has four gears here and your main box has five. So when your auxiliary is going from 3rd and 4th to 3rd and 3rd, 3rd and 4th maxed out you're talking 25 to 26 miles an hour maxed out, but you've got to be lower than that to get it back in the 3rd and 3rd or it won't go in. You got to drop your RPM's down to get it from 3rd and 4th to 3rd.

LET'S DON'T GO THERE

From **Ronald F. Yates** of Horseshoe Bay, this excerpt from a "Hearing on a Motion to Enforce."

Q. And you understand that—did you know by the way that the trip to Oklahoma was to attend a funeral? Did you know that?

A. I couldn't attend my sister's wedding in Oklahoma because I didn't have any money so I don't think it matters of the event.

Q. But you described it to the Court as a vacation, did you not?

A. Yes, I did.

Q. *But you wouldn't necessarily consider a funeral a vacation, now would you?*

A. *I guess it would depend on whose funeral it was.*

The Court: *Let's don't go there.*

OBJECTION OVERRULED!

From **William G. Holloway** (U.S. District Court Reporter, Brownsville Division, Southern District of Texas), this excerpt from a trial of a narcotics case before *U.S. District Judge Filemon B. Vela.* The excerpt is from the direct examination of the witness by an Assistant U.S. Attorney.

Q. Who was working on the dope inside the house? We talked about you helped take some of the nylon sacks out or the bags out. Who else was helping you?

A. Him and that other guy over there, all of us.

Q. When you say "him," who are you referring to?

A. This guy and Jesse.

Q. *When you say "this guy," who are you referring to? What do you know him as, at least what somebody told you his name was?*

A. *Chango.*

Defense Attorney: *Your Honor, I am going to object. He is calling my client a monkey.*

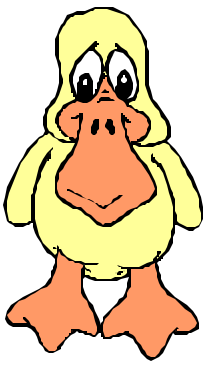
The Court: Overruled.

IF IT QUACKS LIKE A DUCK

From **U.S. Magistrate Judge Jeff Kaplan** of Dallas, who prefaces his submission with this explanation: "Counsel laid down the gauntlet in his reply brief by making the statement, 'If it walks like a duck; and if it quacks like a duck; IT IS A DUCK!' I just couldn't resist."

RECOMMENDATION

The evidence adduced by plaintiffs focuses almost exclusively on the current business activities of ITSNA and TMI in Texas. Unable to recognize the distinction between these companies and ITS, plaintiffs summarize their jurisdictional argument as follows: "If it walks like a duck; and if it quacks like a duck; IT IS A DUCK!" (Plf. Rep. Br. At 2, ¶ 7). *Ordinarily, the court would not quarrel with such an astute observation. However, not all ducks live in the same pond. Unfortunately for plaintiffs, the only "duck" named as a defendant in this case is not a citizen of Texas.* Plaintiffs' motion to remand should be denied.



ABA-Africa Consultant Announcement

ABA-Africa is currently seeking an attorney with five or more years of experience in the protection and promotion of children and women's rights, especially as it pertains to providing access to justice and enforcement of protection against sexual abuse and assault, and domestic violence.

This is a one-year, renewable, paid consultant position. The posting will start in September 2003. French spoken and written language skills are required, and Africa experience is highly desirable.

The identified attorney would serve as Country Director in Rwanda to implement an Access to Justice Program for women and children. The Country Director would work closely with the Ministry of Justice, and change-agents within the legal community to:

* Improve the Ministry of Justice's capacity to address post-genocidal legal challenges—in particular, redrafting laws and drafting laws to implement the Convention on the Rights of the Child and training on implementation of the Children's Act; the training of judges and magistrates, as well as prosecutors.

* Support the Ministry's national media campaign on the legal protections for children, especially girls.

* Develop an institutional capacity to administer community service programs to accommodate the 20,000 or more Gacaca courts' community service commitments.

* Improve the Ministry of Justice's overall capacity to administer justice in an effective and efficient manner.

The Country Director will also provide general guidance to the ABA-Africa programs, will help to supervise ABA-Africa financial affairs, and will work to ensure ABA-Africa compliance with applicable local laws and regulations.

For additional information:
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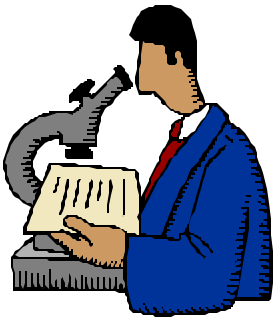
Gruesome Photos Reserved Until Penalty Phase More Prejudicial than Probative. After spending most of the night drinking, defendants determined to "jump" the man who had been driving them around, steal his truck, and sell it. Once they had severely beaten him, however, they decided to kill him to prevent the possibility of him testifying against them, so they stabbed him between fifty and sixty times. At the sentencing phase of trial, the State introduced photographs of the victim's stab wounds. Concluding that the crime satisfied a state "heinous, atrocious, or cruel" capital aggravator, the jury sentenced defendants to death. On appeal, defendants argued that the probative value of the photographs was outweighed by their potential for unfair prejudice. Noting that the focus of the "heinous, atrocious, or cruel" inquiry was supposed to be on the conscious suffering experienced by the victim, the U.S. Court of Appeals for the Tenth Circuit cited the testimony of the medical examiner that at most, only two of the stab wounds had occurred prior to the victim's death, and agreed that defendants had been unduly prejudiced. The Court found it meaningful that the State, hoping to increase the shock value of the photos with the jury, had waited until the sentencing phase to introduce them. *Spears v. Mullin*, No. 01-6258 (August 12, 2003).

Motion to Modify Sentence Not a "Collateral Attack." Entering into a plea agreement for an immigration offense, defendant waived his right to make a direct appeal or to challenge his sentence "in any collateral attack, including but not limited to, a motion brought under Title 28, USC, Section 2255." When an amendment was made to the U.S. Sentencing Guidelines that governed his crime, however, defendant moved to modify his sentence under 18 U.S.C. § 3582. In opposition, the government argued that the motion was barred by defendant's plea agreement. Stating that "a plea bargain waiver . . . is to be construed narrowly," the Tenth Circuit U.S. Court of Appeals found that defendant was not put on notice that Section 3582 motions were included in his waiver. Because defendant's challenge went to the amendment and not to his original conviction or sentence, the Court held that the motion could be made without violating the prohibition against a "collateral attack" as the term is "conventional[ly] understood]." *U.S. v. Chavez-Salais*, No. 02-2138 (July 29, 2003).



Home Arrest Requires Exigent Circumstances Where Body of Defendant Not Open to Public View. Having been informed that defendant was illegally selling alcohol from his home, officers knocked and requested a bottle of wine. Responding, defendant passed a bottle through a hole in the wall next to the door. Officers then identified themselves and directed defendant to open the door. When he did so, he was arrested. Appealing a denied motion to suppress the evidence, defendant argued that his Fourth Amendment right to be "secure in [his] . . . house[]" had been violated by the warrantless arrest. Finding that defendant's "limited exposure" of only his arm and hand evinced "a conscious intention to protect the privacy of his home," the U.S. Court of Appeals for

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the Tenth Circuit distinguished the present case from its own and U.S. Supreme Court precedent establishing that no warrant is required where a defendant stands on the threshold of his home and is open to public view. Noting that at least probable cause and exigent circumstances were required in this case, and that the lower court had made no determination regarding the existence of the latter, the Court remanded for such a determination. *U.S. v. Flowers*, No. 02-5149 (July 22, 2003).

UTAH SUPREME COURT

Alternative Grounds for Affirmance Raised on Appeal Must Be Sustained by Record. Attempting to verify an address, police stopped a woman (defendant) matching the description of an occupant of the home. After obtaining her identification, police retained it while running a "routine" warrants check that revealed two outstanding warrants. In the course of the subsequent arrest, heroin was discovered. At trial, defendant moved to suppress the evidence, arguing that because the officers lacked reasonable suspicion, the stop was unlawful, but her motion was denied. While defendant's appeal was pending, the Utah Court of Appeals decided *Salt Lake City v. Ray*, 998 P.2d 274 (2000), a case holding that where police lack reasonable suspicion, it is unlawful for them to retain identification during a warrants check. Consequently, when defendant's case reached the appellate court, the State acknowledged the trial court's error and argued for the first time that its decision could be sustained by the inevitable discovery doctrine. Accepting this possibility, the appellate court remanded for findings on this theory. Appealing the decision, defendant argued that remand was improper where the State's argument was raised for the first time on appeal. Reversing the Court of Appeals, the Utah Supreme Court held that where an alternative ground for affirming a denied motion to suppress is raised for the first time on appeal, the reviewing court should "decide[] the case on the record before it." Examining the record, the Court found no evidence that the heroin would have been discovered in the absence of the police misconduct that occurred, and reversed the trial court's denial. *State v. Topanotes*, 2003 UT 30.

UTAH COURT OF APPEALS

Victim Contradictions to Defendant Testimony Provide Sufficient Evidence for Fraud Conviction. Defendant was convicted of multiple counts of communications fraud and one count of racketeering after several people testified that he had made material misrepresentations to them in either buying or selling their cars. Contesting the sufficiency of the evidence, defendant pointed to inconsistencies in

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Employment Opportunity

The Millard County Attorney's Office is accepting applications for a full-time Deputy County Attorney starting October 15, 2003. Would be expected to live in the Fillmore or East Millard County area and work at the Fillmore office. Duties would include criminal prosecutions in the District, Justice and Juvenile Courts and handling limited civil matters for Millard County by assignment. Salary is $40,000 to $50,000 per year (depending upon experience) plus the benefit package available to all county employees. Membership in the Utah Bar is required. The Millard County Attorney's Office is an equal opportunity affirmative action employer. If interested, send a resume to LeRay G. Jackson, Millard County Attorney, P.O. Box 545, Delta, Utah 84624, or FAX to (435) 864-2717, or email lerayj@xmission.com by 5:00 p.m., Friday, September 19, 2003. Inquiries may be made by phone at (435) 864-2716.

HIPAA—Exceptions Providing Law Enforcement Officials and Social Service Providers Access to Protected Health Information

By Alexandra Podrid[1]

The new Privacy Rule, the Health Insurance Portability and Accountability Act (HIPAA), that was enacted by Congress in 1996 and amended by the Department of Health and Human Services (DHHS) in 2002, may affect the ability of prosecutors, police officers and social service agencies to administer child abuse cases, because it prevents certain health care affiliates from disclosing protected health information.

HIPAA was created to provide extensive, nationwide protection to medical information by regulating how "covered entities" use and disclose protected health information.[2] Covered entities include health plans, health care clearinghouses and any health care provider that transmits health information electronically.[3] Congress established HIPAA to enable people to switch jobs without losing their health insurance, and not to interfere with law enforcement or social services. The civil and criminal penalties attached to HIPAA violations,[4] however, may deter covered entities from disclosing protected health information, even when they are authorized to do so.

DHHS enacted a number of exceptions that allow covered entities to provide protected health information to law enforcement officials and social service agencies. It is imperative that law enforcement officials familiarize themselves with these regulations, so that they can continue to obtain indispensable medical evidence to effectively investigate and prosecute child abuse cases. Social service providers must also comprehend the HIPAA exceptions so that they may continue to serve victims of abuse, neglect and domestic violence. This article maps the exceptions law enforcement officials and social service agencies can utilize when requesting protected health information from covered entities.

Exceptions for Law Enforcement Access

There are a number of exceptions that permit law enforcement officials to access protected health information. These exceptions bypass the requirement that the individual consent or be given an opportunity to decide whether his or her protected health information will be disclosed.

- **Required by law/mandatory reporting laws:** A covered entity may disclose protected health information to law enforcement officials if it is required to do so by law.[5] An example would be a state law mandating the reporting of certain wounds or other physical injuries.
- **As permitted by a judicial officer:** Law enforcement officials may obtain protected health information from a covered entity if they have a court order, warrant, subpoena or summons issued by a judicial officer or a grand jury subpoena.[6]
- **Restricted access for administrative requests:** An administrative subpoena may be used to obtain protected health information. In order to use an administrative subpoena, however, the following criteria must be met: 1) The information sought must be relevant and material to a legitimate investigation, 2) the request must be specific and limited in scope to meet its intended purpose, and 3) information that does not reveal the individual's identity could not reasonably be substituted for the information sought.[7]
- **Restricted access for the purpose of identifying or locating a suspect:** Except for disclosures required by law, information provided to law enforcement officials for the purpose of identifying or locating a suspect, fugitive, material witness or missing person is limited. In response to such a request, a covered entity may disclose 1) name and address, 2) date and place of birth, 3) social security number, 4) blood type, 5) type of injury, 6) date and time of treatment, 7) date and time of death if applicable and 8) description of distinguishing physical characteristics.[8] When the information sought is for identification and location purposes, a covered entity may not provide any information related to an

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[1] Law Clerk, APRI's National Center for Prosecution of Child Abuse.
[2] *HIPAA Privacy Rule and Public Health: Guidance from CDC and the U.S. Department of Health and Human Services*, Morbidity and Mortality Wkly. Rep., 2003 (Early Release), at 1.
[3] HHS General Administrative Requirements, 45 C.F.R. § 160.103 (2003).
[4] Robert Pear, *Health System Wearily Prepares for Privacy Rules*, N.Y. Times (April 6, 2003) <http://www.nytimes.com/2003/04/06/national/06PRIV.html>.
[5] § 164.512(f)(1)(i).
[6] § 164.512(f)(1)(ii).
[7] § 164.512(f)(1)(ii)(C).
[8] § 164.512(f)(2)(i)(A)-(H).

BRIEFS *continued from page 5*
victim testimony and criticized the trial court's credibility determinations. Reviewing the record, the Utah Court of Appeals agreed with the trial court that defendant's testimony was "directly contradict[ed]" by "almost every victim in this case," held that defendant had failed to show that the trial court's determination was "against the clear weight of the evidence," and affirmed the convictions. *State v. Nichols*, 2003 UT App 287.

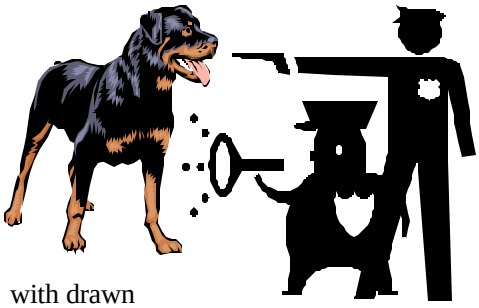
Pro Se Defendant's Failure to File Written Request for Jury Not Fatal. Defendant was arrested for reckless driving and disorderly conduct after an identified citizen reported that he was

tailgating, honking, flashing his lights, and attempting to pass her on a double yellow line. At his arraignment, defendant requested a jury trial. Noting that defendant was "not in any jeopardy of going to jail . . . even if convicted," the trial judge denied the request. The trial judge next asked the City, "So this would be tried as if they were both infractions, then?" This question was never answered clearly. At a subsequent bench trial, defendant renewed his request for a jury trial. The request was again denied, and defendant was found guilty of both offenses, receiving a fine for the disorderly conduct infraction and a suspended six-month jail sentence and one year probation for the class B misdemeanor of reckless driving. On defendant's appeal, the City contended that the denial was proper, pointing to defendant's failure to file a written request for a jury as required by Utah Rule of Criminal Procedure 17(d). Reversing, the Utah Court of Appeals observed that the City had done nothing to refute the trial judge's suggestion that defendant would only be tried for infractions, found that defendant had thus been "misled," stressed that defendant was proceeding pro se and would be subject to jail time if he violated his probation, and held that defendant was entitled to a jury despite his failure to comply with the rule. *Orem v. Bovo*, 2003 UT App 286.

Gender-Based Strikes Violate Equal Protection. Defendant was charged with violating a protective order. During jury selection, defense counsel objected that all three of the prosecution's peremptory challenges had been used to exclude men. The prosecutor explained that two of the jurors she had struck had acknowledged prior involvement in a protective order, and that because they were male, she assumed they had been respondents to protective orders rather than victims, and would consequently favor the defendant. The prosecutor went on to say that she "wasn't looking for men to strike," but only those jury members with past involvement in a protective order. The trial court accepted this as a non-discriminatory explanation and upheld the strikes. On appeal, defendant renewed his claim that the strikes were based on gender stereotypes. In rebuttal, the State argued that because 95% of domestic violence cases involve male perpetrators, the strikes could be upheld as "based on a gender-associated probability grounded in fact," rather than "gender-based stereotypes." Rejecting this argument, the Utah Court of Appeals pointed to Supreme Court precedent prohibiting "any use of gender in the jury selection process."

Finding that the prosecutor's admitted presumption that the potential jurors would favor the defendant because they were male repudiated her claim that her challenges were gender-neutral, the Court remanded for a new trial. *State v. Jensen*, 2003 UT App 273.

Nighttime Stop, Noisy Dog, Loose Shirt, and Unresponsiveness Give Reasonable Suspicion of Concealed Weapon. Officers approaching defendant's truck, which they had stopped for a license plate lighting violation, were startled back to their patrol car



with drawn weapons when defendant's rottweiler suddenly barked and lunged at them. Seeing that defendant had exited the vehicle, the officers called for him to meet them back at their car, but without a word, defendant reentered the cab of his truck. He remained there until again ordered back to the patrol car, at which point he did as instructed. Noting that defendant was wearing a loose, untucked shirt that concealed his waist, one of the officers asked if he was carrying any weapons on him, which defendant admitted he was. Defendant was then searched and, after a large knife was found, arrested. In an incidental search of defendant's vehicle, evidence of methamphetamine production was discovered which the trial court later refused to suppress. On appeal, defendant argued that the officer's inquiry into weapons was unsupported by reasonable suspicion. Observing that the stop occurred at night, that the dog was apparently dangerous, that defendant "completely ignored" the officers' order to meet them at their car, and that defendant was wearing a baggy shirt that could have concealed weapons, the Utah Court of Appeals rejected defendant's argument. In dissent, Judge Davis took issue with each

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individual's DNA or DNA analysis, dental records or analysis of body fluids or tissue.[9]

- **Victims of a crime:** Health care entities may also provide law enforcement officials with an individual's protected health information if the individual is a suspected victim of a crime.[10] In such cases, covered entities can only disclose information if 1) the individual agrees to disclosure, or 2) the covered entity cannot obtain the individual's agreement because of incapacity or an emergency.[11] In cases of incapacity or emergency, it is necessary that 1) the law enforcement official represents that such information is needed to determine whether a crime was committed by someone other than the individual and will not be used against the victim, 2) the law enforcement official represents that law enforcement activity depends on disclosure and would be materially affected by waiting for the individual's consent, and 3) the covered entity, while exercising professional judgment, determines that disclosure is in the best interest of the individual.[12]
- **Decedents:** If a health care provider suspects that an individual has died as a result of criminal conduct, it may disclose protected health information about the decedent to a law enforcement official.[13]
- **Crime on premises:** If a covered entity believes in good faith that protected health information is evidence of criminal conduct that occurred on the premises of the covered entity, it may disclose the information to a law enforcement official.[14]
- **Reporting crime in emergencies:** A health care provider rendering emergency medical care off the premises may disclose protected health information to a law enforcement official if the disclosure is needed to alert law enforcement to 1) the commission and nature of a crime, 2) the location or victims of such crime, and 3) the identity, description and location of the perpetrator.[15] This exception does not apply if the covered health care provider believes the emergency is a result of abuse, neglect or domestic violence.[16]
- **Victims of abuse, neglect or domestic violence:** A covered entity that believes an individual has been the victim of abuse may disclose the individual's protected health information to a government agency that is authorized by law to receive reports of abuse, neglect or domestic violence. Such disclosures are only permitted if at least one of the following applies: 1) the disclosure is required by law, 2) the individual has agreed to the disclosure, 3) the covered entity is expressly authorized by law to disclose such information and the disclosure is necessary to prevent serious harm to someone, and 4) the covered entity is expressly authorized by law to disclose such information and the law enforcement agency represents both that the information will not be used against the individual and that law enforcement activity would be significantly hindered by waiting to get the individual's consent.[17] In these cases, the covered entity must promptly inform the individual that the disclosure was made, unless 1) informing the individual would place the individual at risk of serious harm or 2) the covered entity would be informing the individual's personal representative who is responsible for the abuse, neglect or domestic violence.[18]
- **Averting a serious threat to health or safety:** A covered entity may disclose protected health information if it believes: 1) the disclosure is needed to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and the recipient is able to lessen the threat; or 2) the disclosure is critical to law enforcement's ability to identify or apprehend an individual who either appears to have escaped from the custody of law enforcement or made a statement admitting participation in a violent crime.[19] A covered entity acting on such a belief is presumed to be acting in good faith. An entity covered by HIPAA may not disclose protected health information based on an individual's admitted participation in a violent crime if the statement was made either during therapy, counseling or treatment aimed at lessening the individual's propensity towards violence, or through a request for such therapy, counseling or treatment. The protected health information that may be disclosed under this exception is subject to the same limitations as placed on the exception made for identifying and locating a suspect.[20]

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[9] § 164.512(f)(2)(ii).
[10] § 164.512(f)(3).
[11] § 164.512(f)(3).
[12] § 164.512(f)(3).
[13] § 164.512(f)(4).
[14] § 164.512(f)(5).
[15] § 164.512(f)(6).
[16] § 164.512(f)(6)(ii).
[17] § 164.512(c)(1).
[18] § 164.512(c)(2).
[19] § 164.512(j)(1).
[20] See generally § 164.512(j)(2-4).

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- **Jails, prisons, law enforcement custody:** Correctional institutions and law enforcement officials may obtain the protected health information of individuals in their lawful custody. In such cases, however, a covered entity may only disclose information if the requesting body represents that the protected health information is necessary: 1) to provide health care to the individual, 2) to protect the health and safety of the individual or other inmates, 3) to protect the health and safety of officers, employees or others at the correctional institution, 4) to protect those involved in the transfer or transporting of the individual, 5) to promote law enforcement on the premises of the correctional institution, or 6) to maintain and administer safety, security and good order in the correctional facility.[21] An individual is not subject to this exception when released on parole, probation, supervised release, or otherwise is no longer in lawful custody.[22]

Exceptions for Social Service Agencies

- **Child abuse, neglect, or domestic violence:** A covered entity may disclose the protected health information of an individual who is believed to be the victim of abuse, neglect or domestic violence. Such a disclosure can be made to a social service or protective services agency that is authorized by law to receive reports of abuse, neglect or domestic violence. Disclosures to social service providers are limited to three types of cases: 1) the individual consents to the disclosure, 2) the disclosure is required by law, or 3) the disclosure is authorized by law, and either the covered entity believes the disclosure is needed to prevent serious harm, or the individual is incapacitated and the public official represents that the information is required for immediate enforcement activity and will not be used against the individual.[23] When a covered entity makes a disclosure under this exception it is required to promptly inform the individual. In cases where a covered entity believes that informing the individual or the individual's representative, such as a guardian, would place the individual at risk of serious harm, the covered entity need not inform the individual or the individual's representative of the disclosure.[24]
- **Mandatory reporting laws:** HIPAA preempts state law with few exceptions. HIPAA does not, however, preempt state law provisions that provide for the reporting of disease, injury, child abuse, death, or for public health surveillance purposes.[25] For example, if a state law requires a hospital to report cases of child abuse to a social service agency, HIPAA would not prohibit the disclosure.

Delaying Disclosure to Individuals

An individual may request an accounting of all the instances in which a covered entity has disclosed his or her protected health information within the past six years.[26] Covered entities must temporarily suspend an individual's ability to receive an accounting of disclosures if a law enforcement official submits a written statement that such an accounting would impede law enforcement activities.[27] The law enforcement official must specify a time limitation on the suspension. In order to place an immediate halt on an individual's ability to seek an accounting of disclosures, a law enforcement official may make an oral request to the covered entity and then follow up with a written request within 30 days.[28] A covered entity that receives an oral request to suspend an individual's access to an accounting is required to document the request and temporarily suspend access for a period of no more than 30 days.[29] The U.S. Department of Justice informally recommends that a law enforcement official present a badge when making an oral request and submit written requests on official letterhead.

Conclusion

While covered entities may fear penalties for HIPAA violations, there are a number of situations in which law enforcement officials and social service providers should be able to obtain vital medical evidence. The HIPAA regulations are new and it is difficult to predict how the courts will interpret and apply these rules. By understanding the above exceptions, however, law enforcement officials and social service agencies can continue to procure the health information they need in order to serve their communities.

[21] § 164.512(k)(i)(a-f).
[22] § 164.512(k)(5)(iii).
[23] § 164.512(c)(i).
[24] § 164.512(c)(2).
[25] § 160.203(c).
[26] § 164.528(a)(1).
[27] § 164.528(a)(2)(1).
[28] § 164.528(a)(2)(ii).
[29] § 164.528(a)(2)(ii).

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factor offered by the majority, pointing out that "[i]ndividuals may be armed day or night," that "[i]f anything, the presence of [defendant's] dangerous dog cuts against the notion that [defendant] would feel the need to carry weapons," that "[l]ogic suggests that [defendant] re-entered . . . his vehicle to retrieve documentation," and that there were no bulges in defendant's clothing suggesting the presence of weapons. *State v. Despain*, 2003 UT App 266.

No Preference for Relatives in Adoption Proceedings. Where a child is removed from parental custody, U.C.A. §§ 78-3a-301 to -307 grant preference to the request of other relatives for custody at abuse, neglect, and dependency proceedings. Children were removed from their mother's custody and placed with their grandmother. Two weeks later, due to family and financial trouble, grandmother returned the children to the State, who then placed the children in a foster home. One year later, the parental rights of the children's parents were terminated, and both the foster parents and the grandparents petitioned to adopt. Finding that it would not be in the children's best interests to be adopted by their grandparents, the juvenile court denied the grandparents' petition. On appeal, grandmother argued that the trial court erred in not granting preference to her petition at the adoption phase. Rejecting this argument, the Utah Court of Appeals observed that the statutory preference extended during the initial placement phase does not continue to the adoption phase. Reiterating its previous holding that "[t]he standard for adoption is the best interest of the child," the Court affirmed the denial of the petition. *G.H.M. v. State*, 2003 UT App 262.

Jury Trials—Russian Style

(An excerpt from "Russia Tests Juries by Trial and Error," printed in *The Washington Post*, September 2, 2003.)

For more than eight decades, Russians charged with a crime in Moscow were brought shackled into cramped courtrooms, where Communist Party-appointed judges and citizen assessors almost invariably convicted them—that is, if they received that much due process.

The right to a trial by a jury of one's peers was enshrined in the new Russian constitution in 1993, but in most courts, power has remained in the hands of judges—who convict defendants 99.5 percent of the time, according to annual Justice Ministry statistics. It has taken 10 years to put the jury concept into practice in the aging headquarters of the Moscow City Court.

The introduction of such notions as the presumption of the defendant's innocence and the prosecutor's burden of proof might give the system a measure of credibility with the Russian people.

Yet change does not come easily. Even [defense attorneys] are absorbing alien concepts. Conviction requires a simple majority of jurors here. Told during a break that U.S. juries must rule unanimously, [one] defense attorney seemed astonished and translated that into the Russian context. "Then," he exclaimed, "you only have to buy one."

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Prosecutor Profile

Jared W. Eldridge

Juab County Attorney

Ten years ago, Jared W. Eldridge might have laughed at the mere suggestion that he would one day sit as Juab County Attorney. But then, the Jared of ten years ago was a Business Management major whose primary concern was the number of climbs at the Rock Garden he could fit into his schedule in any given week. It would still be another year or two before, as a newly married graduate with a family looming large and the economy floundering around him, Jared would be told that a promising career in business law and estate planning was just a law degree away. Under such circumstances, Jared can hardly be blamed for giving way.

Jared's parents and siblings were at least as surprised as he was at his decision to go to law school, but they were in no way discouraging. No other profession could have supplied them so readily with the insults, jokes, and indignities that they now felt themselves entitled to volley at will at the suffering young relative they had once claimed as their own. On occasion they broadened their target. Jared's father, summoned for jury duty shortly after Jared began his first year at Willamette, was asked during voir dire about his children and their various occupations. Thinking that perhaps this was his chance to have himself excluded, Jared's father eagerly responded that he had a son in law school, and that he regretted that his son had not chosen an honest profession. Much to his disappointment, he was summarily approved for the jury panel.

Jared's father wasn't the only one with disappointments. During his second year of law school, Jared began clerking for a firm doing business law, and, inevitably, made the crushing discovery that the work he had so anxiously anticipated was "incredibly boring." Fortunately, his hope that there was something at the firm that could at least keep him awake lasted long enough for him to encounter an attorney there who handled criminal defense and personal injury cases. Immediately intrigued by criminal law, Jared had at last found his niche.

Now he just needed a job. Drawn by the prospect of moving closer to family, Jared and his wife came back to Utah, where he accepted an offer from the Salt Lake Legal Defenders Association. Two years later, he moved to the Public Defenders Office in Utah County, where he spent two more years defending before taking office eight months ago as the Juab County Attorney. As a defender, Jared recalls representing basically three categories of people: 1) "mostly decent people who had made some stupid decisions," 2) "a handful of thoroughly evil" people (including one man who "probably taught Satan a few lessons"), and 3) an occasional, bona fide innocent. Properly discerning who falls where among these three groups—that justice might prevail—is Jared's greatest aspiration as a prosecutor. But, as every prosecutor knows, seeking justice has never been effortless—sometimes he's almost ready to give business law a second chance.

QUICK FACTS

Undergraduate:	**BYU, Business Management (emphasis in Finance)**
Law School:	**Willamette University (1998)**
Favorite Team:	**University of Kansas Jayhawks (he's a native of Kansas)**
Favorite Food:	**Homemade German Chocolate Cake (his wife makes it for his birthday once a year)**
Last Book Read:	***Valhalla Rising*, by Clive Cussler**
Favorite Book:	***Great Expectations* (but he enjoys almost anything by Charles Dickens and Mark Twain)**
Hobbies:	**Running (usually about 3 times a week, though he always plans on 5), Rock Climbing, and Camping**

2003 TRAINING SCHEDULE

UTAH PROSECUTION COUNCIL AND OTHER UTAH CLE CONFERENCES

October 8-10	GOVERNMENT CIVIL PRACTICE CONFERENCE *Training for attorneys who handle the civil side of county and city law offices.*	Zion Park Inn Springdale, UT
November 12-14	COUNTY ATTORNEYS' EXECUTIVE MEETING AND UAC CONF. *The only opportunity in the year for County/District Attorneys to gather as a group to discuss issues common to them. Held in conjunction with UAC's Annual Meeting.*	Dixie Center St. George, UT
Late Winter (Tentative, depending on available budget)	ANATOMY OF A COMPUTER CRIME CASE *In-depth examination of a computer crime case from before the first search warrant, all the way through to the verdict. For prosecutors and investigators.*	Location TBD

NATIONAL COLLEGE OF DISTRICT ATTORNEYS (NCDA)* NATIONAL ADVOCACY CENTER (NAC)** AMERICAN PROSECUTORS RESEARCH INSTITUTE (APRI)*** AND OTHER NATIONAL CLE CONFERENCES

~~March 9-13~~ ~~June 8-12~~ ~~July 20-25~~ October 26-30	PROTECTING CHILDREN ONLINE—FOR PROSECUTORS *This excellent program is put on by the National Center for Missing and Exploited Children, with co-sponsorship by the Office of Juvenile Justice and Delinquency Prevention (OJJDP).* ***The course is very nearly free of cost to attendees. The sponsors cover the cost of airfare, lodging, and of breakfast and lunch on the days of training. Attendance is limited and sessions fill up quickly, so don't delay.*** *For a copy of the agenda and a registration form, call UPC at (801) 366-0202, or e-mail:* mnash@utah.gov	Alexandria, VA
October 4-8	THE EXECUTIVE PROGRAM—NCDA*	Marco Island, FL
October 6-10	INVESTIGATION AND PROSECUTION OF CHILD ABUSE *Multi-disciplinary teams are especially invited to this excellent training.*	APRI*** Baltimore, MD
October 19-23	PROSECUTING DRUG CASES—NCDA*	San Diego, CA
October 26-30	SUCCESSFUL TRIAL STRATEGIES—NCDA*	New Orleans, LA
November 9-13	PROSECUTING VIOLENT CRIME—NCDA*	Orlando, FL
November 16-20	GOVERNMENT CIVIL PRACTICE—NCDA*	Los Angeles, CA
November 16-20	EVIDENCE FOR PROSECUTORS—NCDA*	San Francisco, CA
November 17-21	FINDING WORDS: Interviewing Children and Preparing for Court *Preference given to multi-disciplinary teams of prosecutors/investigators/etc.*	APRI*** Winona, MN
November 18-20	PROSECUTING ENVIRONMENTAL CRIMES *Sponsored by the Western States Project.* ***Scholarships are available from the Project to help defray the costs of attending this course.*** *For more information contact the Utah WSP representatives: Craig Anderson, Dep. Salt Lake Dist. Atty. (801) 468-2655, or Christopher Morley, Asst. Atty. Gen. (801) 366-0282.*	Oklahoma City, OK

For More Information Regarding Upcoming Training, Call Utah Prosecution Council: (801) 366-0202

NATIONAL COLLEGE OF DISTRICT ATTORNEYS (NCDA)*
NATIONAL ADVOCACY CENTER (NAC)**
AMERICAN PROSECUTORS RESEARCH INSTITUTE (APRI)***
AND OTHER NATIONAL CLE CONFERENCES

November 20-22	DNA: JUSTICE SPEAKS—APRI*** *Jurisdictions are encouraged to register as a team consisting of prosecutors lab analysts and law enforcement officers. Additional team members may include sexual assault nurse examiners, victim advocates, corrections and judiciary.*	Marriott Crystal City Arlington, VA
December 7-11	FORENSIC EVIDENCE—NCDA*	San Diego, CA
December 7-11 **NEW COURSE**	MEETING CHALLENGES IN PROSECUTION & VICTIM ADVOCACY—NCDA* *A conference for prosecutors, law enforcement and victim advocates.*	San Antonio, TX
December 8-12	APPELLATE ADVOCACY *Learn the arts of successful appellate oral argument and brief writing.* ***The registration deadline is October 3, 2003.***	NAC** Columbia, SC
December 15-19	DNA BASIC *Learn the basic science of ANA forensic evidence and how to effectively present it in court.* ***The registration deadline is October 3, 2003.***	NAC** Columbia, SC
January 5-9 March 15-19 March 29-Apr. 2	TRIAL ADVOCACY I *A practical, "hands-on" training course for trial prosecutors.* ***The registration deadline for all three courses is October 24, 2003.***	NAC** Columbia, SC
January 12-16	CYBERSLEUTH I *Learn to prosecute computer and internet-related cases.* ***The registration deadline is October 24, 2003.***	NAC** Columbia, SC
January 20-23	PROSECUTING THE DRUGGED DRIVER *Learn about drugs, how they impair driving and how to prove it.* ***The registration deadline is November 21, 2003.***	NAC** Columbia, SC
January 26-30	TRIAL ADVOCACY II *Practical instruction for experienced trial prosecutors.* ***The registration deadline is November 21, 2003.***	NAC** Columbia, SC
February 2-6	PRETRIAL PREPARATION *Gain a mastery of effective pretrial advocacy and preparation.* ***The registration deadline is November 21, 2003.***	NAC** Columbia, SC

* For copies of course description and registration brochures for NCDA courses, call Prosecution Council at (801) 366-0202 or e-mail: mnash@utah.gov, or go to the college's web site: http://www.law.sc.edu/ncda/courses.htm

** Courses at the National Advocacy Center (NAC) *are free of cost. Travel, lodging and meal expenses are paid or reimbursed by NAC, and no tuition is charged.* For a short description of the courses and an application form for admission to NAC courses, contact Prosecution Council at (801) 366-0202, or e-mail: mnash@utah.gov

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